ST 98-2
Tax Type: SALES TAX
Issue: Machinery & Equipment Exemption - Manufacturing Rolling Stock (Purchase/Sale Claimed To Be Exempt)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS **v.** **XYZ COMPANY** **Taxpayer**	**Docket No.** **IBT #** **Claims for Credit/Refund** **Linda Olivero** **Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Charles Hickman, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Gary L. Smith of Loewenstein, Hagen, Oehlert & Smith, P.C. for XYZ COMPANY

Synopsis:

This cause came on to be heard on the motion of the Department of Revenue ("Department") to dismiss two of the claims filed by XYZ COMPANY ("taxpayer") on the basis that the claims were filed beyond the statute of limitations. The taxpayer filed three claims in May of 1996, and the Department issued three Notices of Tentative Denial of Claim ("Notices"). The taxpayer's protests of the Notices were consolidated in this case. The Department's motion concerns only two of the three claims that were filed. At the hearing on the motion, the Department's counsel agreed that the Department

is effectively requesting summary judgment on the two Notices at issue, and therefore the Department's motion will be construed as one for summary judgment. After reviewing the briefs and exhibits provided by the parties, it is recommended that summary judgment be entered in favor of the Department on two of the Notices of Tentative Denial of Claim.

FINDINGS OF FACT:

1. The Department audited the taxpayer for the period of July 1988 to June 1991. At the conclusion of the audit, the Department determined that the taxpayer owed additional use tax for various items that were purchased during the audit period. (Taxpayer Ex. C)
2. On August 27, 1991, the taxpayer sent a letter to the Department stating that it disagreed with the auditor's conclusions concerning the rolling stock exemption. In the letter the taxpayer stated that it was paying the tax liability, including interest, "under protest." (Taxpayer Ex. A)
3. The letter indicates that the items in question include "Dump Trucks, Pup Trailers, Lowboy, some repair parts, tires, etc." Also, in the letter the taxpayer asks the Department to "send the form for a Claim for Credit on these vehicles." (Taxpayer Ex. A)
4. On October 3, 1991, the taxpayer filed a claim for credit for $14,392 in which it asserted that it was entitled to a credit for use tax paid on various vehicles that qualified for the rolling stock exemption. (Taxpayer Ex. C)
5. On June 8, 1994, the Department issued a Notice of Tentative Determination of Claim, which denied the claim that was filed on October 3, 1991. The taxpayer

timely protested the Notice. The Notice and protest were sent to the Administrative Hearings Division with a docket number of 94-ST-. (Taxpayer Ex. C)

6. On April 24, 1996, a hearing was held in case number 94-ST. On November 25, 1996, the Department issued a decision in which it granted most of the taxpayer's claims. (Taxpayer Ex. C)
7. On May 13, 1996, the taxpayer filed three additional claims for credit with the Department. The first one requests a credit of $14,921 for parts and supplies used on the vehicles that were included in the claim filed in October of 1991. The parts were acquired during the audit period of July 1, 1988 to June 30, 1991. (Dept. Group Ex. #1)
8. The second claim filed on May 13, 1996 requests a credit of $13,781 for items used in the taxpayer's asphalt operations that were acquired during the audit period of July 1, 1988 to June 30, 1991. (Dept. Group Ex. #1)
9. The tax related to the first and second claims was paid on August 27, 1991. (Dept. Group Ex. #1)
10. On July 1, 1996, the Department issued Notices of Tentative Denial of Claim for the claims that were filed in May of 1996. The two Notices of Tentative Denial of Claim relating to the two claims at issue were submitted under the certificate of the Director of the Department. (Dept. Group Ex. #1)

CONCLUSIONS OF LAW:

Under section 2-1005(c) of the Code of Civil Procedure, a party is entitled to summary judgment under the following circumstances:

> "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (735 ILCS 5/2-1005(c))

The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists. Gilbert v. Sycamore Municipal Hospital, 156 Ill.2d 511, 517 (1993). In determining whether a question of fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. (Id. at 518.) In this case, the parties have agreed to the facts as stated above. The only issue is whether the claims were filed beyond the statute of limitations.

The Use Tax Act (35 ILCS 105/1 *et seq.*) imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. Section 12 of the Use Tax Act incorporates by reference section 6b of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the Notice of Tentative Determination of Claim issued by the Department is *prima facie* proof of the correctness of the Department's determination, as shown therein. 35 ILCS 105/12; 120/6b. Once the Department has established its *prima facie* case by submitting the Notice of Tentative Determination of Claim under the certificate of the Director, the burden shifts to the claimant to overcome this presumption of validity. Sprague v. Johnson, 195 Ill.App.3d 798, 804 (4th Dist. 1990); Clark Oil & Refining Corp. v. Johnson, 154 Ill.App.3d 773, 783 (1st Dist. 1987).

Section 21 of the Use Tax Act provides in part as follows:

> "As to any claim for credit or refund filed with the Department on and after January 1 but on or before June 30 of any given year, no amount of tax or penalty or interest erroneously paid (either in total or partial liquidation of a

> tax or penalty or interest under this Act) more than 3 years prior to such January 1 shall be credited or refunded, ***. No claim shall be allowed for any amount paid to the Department, whether paid voluntarily or involuntarily, if paid in total or partial liquidation of an assessment which had become final before the claim for credit or refund to recover the amount so paid is filed with the Department, or if paid in total or partial liquidation of a judgment or order of court." (35 ILCS 105/21).

The Department argues that because the tax relating to the first two claims filed in May of 1996 was paid more than 3 years prior to January 1, 1996, the claims were untimely and properly denied by the Department.

The taxpayer argues that the two claims are "amended claims" that relate to the original claim that was filed on October 3, 1991. The taxpayer states that section 21 does not prohibit amendments to claims and only bars claims that have "become final before the claim for credit or refund to recover the amount so paid is filed with the Department." (35 ILCS 105/21) The taxpayer contends that because the original claim was not final at the time that the "amended claims" were filed, they are not barred by the statute of limitations. In addition, with respect to the claim relating to the parts of the vehicles, the taxpayer argues that the Department had notice that the taxpayer was contesting the parts of the vehicles by its "timely protest" letter dated August 27, 1991. (Taxpayer's brief, p. 4) The taxpayer also argues that the claim concerning the parts of the vehicles is a derivative claim of the original claim; if the vehicles in the original claim did not qualify for the exemption, then the parts would not qualify. No additional issues are involved in the claim concerning the parts.

The Department argues that the claims are not "amendments" because they concern different amounts and different items of tangible personal property than those in the original claim. In response, the taxpayer argues that an amendment will change either

the amount of the claim or the legal basis for it. There's no other reason for amending a claim.

The taxpayer's arguments are without merit. First, the statute of limitations does not begin to run when the assessment becomes final. Under the plain language of the statute, the taxpayer has a duty to file a claim for credit, and the limitations period starts to run at the time that the taxpayer erroneously paid the tax, penalty, or interest. (See 35 ILCS 105/19, 21) Because the tax relating to both claims was paid in August of 1991, and the claims were not filed until May of 1996, they are barred by the statute of limitations.

The fact that the taxpayer referred to the vehicle parts in its letter dated August 27, 1991 is irrelevant. Although the letter states that the items in question include "Dump Trucks, Pup Trailers, Lowboy, some repair parts, tires, etc.," the parts were not included in the original claim that was filed in October of 1991. In the letter, the taxpayer asks the Department to "send the form for a Claim for Credit on these vehicles." This request indicates that the taxpayer was aware that it needed to file the form in order to receive a credit. Although the taxpayer argues that this claim is a derivative claim of the original claim because the parts are related to the vehicles, the parts are separate items of tangible personal property and should have been included in the original claim.

At the hearing on the motion, the Department conceded that if the taxpayer had included the vehicle parts in the claim filed in October of 1991, then the Department would have allowed the rolling stock exemption on the parts relating to the vehicles that were found to be exempt. The Department also conceded at the hearing on the motion that at the evidentiary hearing held on April 24, 1996, an employee of the Department

reviewed the documents concerning the parts to the vehicles. The taxpayer argues that because of these concessions, the claim concerning the parts should not be dismissed. These concessions, however, are irrelevant to whether the claim was timely filed. Even though the taxpayer presented documents concerning the parts to the Department at the hearing in April, the only issue before the administrative law judge (ALJ) at the hearing was the Department's Notice of Denial of the claim that was filed in October of 1991. As previously stated, the parts were not included in that claim, and the Department cannot allow a refund if a timely claim is not filed.

With respect to the second claim that was filed in May of 1996, the taxpayer admits that the claim concerns a different legal basis and an amount separate from the rolling stock claim. The taxpayer argues, however, that at the hearing on April 24, 1996, the ALJ granted the taxpayer leave to amend the claims.

A review of the transcript of the hearing held in April of 1996 indicates that the ALJ did not grant the taxpayer leave to amend the claims. At the hearing, the taxpayer's counsel requested leave to amend the Sales and Use Tax Return and stated that he was submitting two amendments: one relating to the rolling stock parts and one relating to the asphalt plant machinery and equipment. (Taxpayer Ex. B, 4/24/96 Tr. pp. 6-7) Taxpayer's counsel then asked if the amendments should be submitted at a later date while the hearing continued with the rolling stock equipment. The ALJ responded by saying that the amendments should be submitted at a later date, and the hearing proceeded on the original claim. (Taxpayer Ex. B, 4/24/96 Tr. pp. 6-7)

Notwithstanding the fact that the transcript indicates that the taxpayer was not given leave to amend the claims, an ALJ does not have authority to grant leave to amend

claims. An ALJ has authority to allow an amendment of the taxpayer's protest prior to the entry of the pre-trial order (See 86 Ill.Admin.Code, ch. I, sec. 200.120(c)), but not the claim. The Use Tax Act states that the taxpayer must file the claim with the Department, and then the Department will review the claim. (35 ILCS 105/19) If the Department issues a Notice of Tentative Denial of Claim, then the taxpayer may file a protest in response to the Department's Notice. (See 86 Ill.Admin.Code, ch. I, sec. 200.120(a)) It is only when the taxpayer files a timely protest to the Department's denial of the claim that the Office of Administrative Hearings will have jurisdiction over the case. (Id.) The ALJ therefore did not have authority to grant leave to amend the claim.

Finally, the taxpayer contends that the Department is estopped from arguing that the claims are barred by the statute of limitations. The doctrine of estoppel is applied against the State only to prevent fraud and injustice. Brown's Furniture, Inc. v. Wagner, 171 Ill.2d 410, 431 (1996). This is especially true when public revenues are involved. Id. In this case, the taxpayer was aware that a claim must be filed in order to receive a credit or refund. (Taxpayer Ex. A) The taxpayer did not explain why the items were not included in the original claim. These facts do not warrant applying estoppel against the Department.

Recommendation:

For the foregoing reasons, it is recommended that the Department's motion to dismiss/motion for summary judgment be granted, and the two Notices of Tentative Denial of Claim issued on July 1, 1996 denying the taxpayer's claims in the amount of $14,921 and $13,781 be upheld. The taxpayer's protest of the Notice of Tentative Denial

of Claim issued on July 1, 1996 concerning the claim for $44,855.24 covering the audit period of 7/1/91 to 9/21/94 will have a new docket number of 98-ST-.

_____
Linda Olivero
Administrative Law Judge

Enter: